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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1960

## No. 473

**ANTHONY C. KOTRICH** and **CLARA KOTRICH**, his wife; **JOHN EKERN OTT** and **CATHLEEN L. OTT**, his wife; **EVA BOITANO**; **PAUL FRENZEN** and **CLARA FRENZEN**, his wife; **WESLEY R. STARKEY** and **WILMA A. STARKEY**, his wife; **JOHN H. LOGAN** and **VERNA S. LOGAN**, his wife; **KEITH E. LUCAS** and **GLADYS LUCAS**, his wife; **WILLIAM T. MURPHY** and **FRANCES C. MURPHY**, his wife; **ROLAND E. GRELLO** and **DOROTHY A. GRELLO**, his wife; **ALBERT M. PELLETIER** and **JOSEPHINE B. PELLETIER**, his wife,

*Plaintiffs-Appellants,*

vs.

**COUNTY OF DU PAGE, ILLINOIS**, a Municipal Corporation and **SALT CREEK CLUB**, a not for profit corporation in Illinois,

*Defendants-Appellees*

On Appeal from the Supreme Court of Illinois

## JURISDICTIONAL STATEMENT

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# Supreme Court of the United States

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No.

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*Plaintiffs-Appellants,*

vs.

COUNTY OF DU PAGE, ILLINOIS, a Municipal Corporation and SALT CREEK CLUB, a not for profit corporation in Illinois,

*Defendants-Appellees*

On Appeal from the Supreme Court of Illinois

## JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of Illinois, filed May 16, 1960. On a certificate of importance giving direct appeal, that court affirmed the judgment of the Circuit Court of Du Page County,

which had sustained the validity of the Du Page County Zoning Ordinance, and had dismissed the cause, on April 6, 1960. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported in 19 Ill. 2d 181 and in 166 N.E. 2d 601.

A copy of the majority opinion appears in Appendix B, *infra*, p. 19.

A copy of the dissenting opinion appears in Appendix B, *infra*, p. 26.

A copy of the opinion of the Circuit Court of Du Page County, not reported, appears in Appendix B, *infra*, p. 13.

A copy of the Resolution of the Board of Supervisors of Du Page County, appears in Appendix A, *infra*, p. 10.

## JURISDICTION

This is a declaratory judgment proceeding, questioning the validity of the Du Page County Zoning Ordinance, in full force and effect May 1, 1957, on the ground that it denies to the appellants the equal protection of the laws and deprives them of their property without due process of law, contrary to the guarantees of the Fourteenth Amendment to the Constitution of the United States. (Rec. 4; Appellants' Abst. pp. 3-15; Appendix B, *infra*, p. 19).

The date of the judgment of the Supreme Court of Illinois, sought to be reviewed, is March 31, 1960. A petition for rehearing was filed, April 13, 1960. On its denial, the opinion was modified, May 16, 1960. (Rec. 26.)

The notice of appeal was filed in the Supreme Court of Illinois, August 11, 1960. (Rec. 27.)

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. sec. 1257 (2) and (3).

The following decisions are believed to sustain the jurisdiction of the Supreme Court of the United States to review this case on appeal: *Williams* v. *Bruffy*, 96 U.S. 176; *King Manufacturing Company* v. *City Council of Augusta*, 277 U.S. 100; *Jamieson* v. *Texas*, 318 U.S. 413; *Poulos* v. *New Hampshire*, 345 U.S. 395.

## STATUTES INVOLVED

The statutes involved are: "An Act to revise the law in relation to the common law," Chap. 28, and "An Act in relation to county zoning", and Chap. 34, pars. 142i, 152j, 152k.1, 152k.2, 152k.3, 152k.4, 152m and 152o, Illinois Revised Statutes, 1957; also secs. III-A1, IV-F-1 and 2, V-A-1 and 2b, V-B-1, 2 and 5, and VIII-B-s-c and d, "Du Page County Zoning Ordinance," 1957.

## QUESTIONS PRESENTED

Are not due process and equal protection, as guaranteed to Appellants by both the federal and state constitutions offended, when variations can be granted only under the statutory provisions and safeguards provided therein, while "special uses", can be created and granted without limitation of any kind, affecting changes in districts where they are granted, merely at the whim of a county board, in all unincorporated areas of Illinois.

Where the Du Page county board of appeals, under the explicit provisions of the 1935 Illinois county zoning enabling Act gave a reasoned refusal to the proposed restricted private sports club petitioning to establish itself in a district, since 1957 zoned and used for "single-family residences having a minimum of one acre lot area", because

the sports club could not prove any required "practical difficulties" or "particular hardship" permitting it to receive a statutory "variation", may the Du Page county board, thereafter, permit that sports club to establish itself on the identical tract as an "exception", which has no statutory existence in Illinois, by the affirmative vote of less than three-fourths of all members of the county board as is required to grant a variation.

Does not the granting of a "special use" to the Club, in the Du Page County district zoned for single-family residence use and occupancy on a lot requirement area of a one-acre minimum, remove the restrictions imposed by the Du Page County Zoning Ordinance on the club property, located therein, while leaving those zoning restrictions on all other properties in the district, in view of the exercise, by the County Board, of a provision in the county zoning ordinance without any statutory foundation, all in violation of the equal protection clauses of both the federal and state constitutions, insofar as Appellants are concerned.

May the Du Page county board refuse to use its statutory power, to prohibit incompatible structures and uses, in a district zoned for single-family residence use, with a lot requirement of a one-acre minimum, and grant a permit for the proposed establishment of a highly restricted private sports club, of an anticipated membership of 275, without violating the due process and equal protection guarantees of both the federal and state constitutions, insofar as they protect appellants.

May the Du Page county board, within the powers granted to it by the county zoning enabling Act, implement them in such a manner as to enable it to grant a permit to the establishment of a proposed highly restricted private sports club, in an area zoned and used as a single-family

residence district, improved with homes ranging from $42,000 to $70,000, by the board's use of a provision inserted in the Du Page County Ordinance, without any statutory basis, and thus, defeat the purposes of the Act, without infringing the due process and equal protection clauses of both the federal and state constitutions, insofar as the rights of the Appellants are guaranteed thereunder.

Is the public welfare best served, by preferring the present desire of a highly restricted club, which does not yet have its anticipated membership, eventually of 275 members, to establish itself in a district zoned as R-2, single family residence area, with a one-acre lot requirement, over the opposition expressed by owners and residents of the R-2 area before the Du Page county board of appeals; and after a refusal of that board to the club for its requested zone change in that district, to have a mere majority of the county board (three-quarters of all members of the county board must vote to favor the grant of a variation under the statute) overrule the considered and fact-supported rejection of the application of the club by the board of appeals and grant the club's requested "special use".

Where the Illinois county zoning enabling Act, 1935, empowers county boards to divide unincorporated county areas into districts and classes according to use of land and buildings, and to prohibit incompatible structures, to best effect the purposes of the Act, may the Du Page county board, enact into the 1957 Du Page County Zoning Ordinance, not only provisions effectuating all granted powers, but also enacting other provisions into the selfsame ordinance enabling the board, in its unfettered discretion, to nullify the granted powers of the Act and to avoid the restrictions of the Act and thwart the purposes of the Act, without offending the rights guaranteed to Appellants by the due process and equal protection clauses of both the federal and state constitutions.

## STATEMENT OF THE CASE

### How the federal question is presented.

In the first amended complaint, incorporated the first, second and third amendments to the complaint, appear these words:

> "(c) That said ordinance denies the plaintiffs the equal protection of the laws and deprives the plaintiffs of their property without due process of law contrary to the constitution of the State of Illinois and the constitution of the United States."

And also appear these words:

> "5. That the said Resolution (of the Board of Supervisors of Du Page County) violates and contravenes the Constitution of the State of Illinois, and the Constitution of the United States each of which provided that no person shall be deprived of property without due process of law." (Rec. 4; Appellants' Abst. p. 9)

The opinion of the trial court contains these words:

> "I think this pretty much blends into Mr. Woodward's final point, that the application of this special use as applied to plaintiff's property is a violation of due process of law.
>
> "There is no question but what occasionally in the application of police powers one person's property may be damaged or he may be deprived of some special right by virtue of the police power being enacted for the public good.
>
> "In determining whether the exercise of the police power is unconstitutional as to an individual property, we must take into consideration the fact as to whether the public good is greater than the damage which may be had to the particular individual's property.

"There has been some testimony here regarding damage to plaintiffs' properties. However, it is vague. It isn't too concise, and it was met by testimony and witnesses on behalf of the defendants. There is no question but what one person may consider this use in the neighborhood a detriment to his property, but you might get another person or two people who would consider it an asset and would like to live in the vicinity of a park and recreation area of this kind." . . .

"Considering all of the points that have been raised, I believe that the ordinance is valid and that the resolution that was passed was legal." (Rec. 4; Appellants' Abst. pp. 81-2; Appendix B, *infra*, p. 13.)

That these words, in the nature of assignment of errors, appear (Rec. 6, Appellants' Brief, p. 4):

"3. **APPELLANTS' THEORY**

"It is the theory of the plaintiffs (appellants) that the special use permit granted to the defendant, club, is void for the following reasons;

"(1) That special use permits of the type under consideration are not authorized by the county zoning enabling act.

"(2) That the special use provisions of the county zoning ordinance are unconstitutional and void.

"(3) That the resolution of the county board granting the special use permit is void."

In the Supreme Court of Illinois, to which direct appeal was taken, on a certificate of importance issued by the trial judge (Rec. 4; Appellants' Abst. p. 19) among the points submitted for that court's determination appear these words (Rec. 4; Appellants' Brief p. 30):

"IV.

**"SHOULD THE DEFENDANT, CLUB, BE PERMITTED TO CONDUCT ITS PROPOSED ACTIVITY ON THE SUBJECT PREMISES, THE PLAINTIFFS WILL BE DEPROVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.**

Which section concludes with these words:

> "In view of the foregoing, the deprivation of plaintiffs' property and the destruction of value of their property, cannot be questioned, but as being in utter and flagrant violation of due process of law." (R. 4, Appellants' Brief pp. 6, 30, 34.)

The main opinion of the Supreme Court of Illinois, disposed of that issue in these words:

> "The plaintiffs contend, finally, that to allow the club to conduct its proposed activities under a special use permit will deprive them of their property without due process of law. They argue that the damage to their property far outweighs any public benefit the club may produce. Although an expert witness for the plaintiff testified that operation of the club would substantially depreciate the value of surrounding property, two witnesses for the defendants took the opposite view. The county board imposed several restrictions designed to protect nearby houses from excessive light and noise. We think the record shows that the county board's action was not arbitrary and did not deprive the plaintiffs of their property without due process of law." (Rec. 20-1, Appendix B. p. 26.)

However, the dissenting opinion of the Chief Justice states:

> "From the standpoint of zoning enthusiasts and administrators the special use device provides a flexible method disposing of troublesome 'unique' situations. On the other hand, its use in such cases as here (recreation center) is the further limiting of the rights of ownership of property under the guise of the much tortured and misused police power." (Rec. 22, Appendix B. p. 28.)

In consequence of the case herein on appeal, with its strong dissenting opinion, zoning in Illinois generally, and in the unincorporated county areas, particularly, is not governed by laws, but by men. The issues are consequent to and anticipated in those decided in *Village of Euclid, et al.* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Since then, some issues raised therein by the appellees, on which decisions were anticipated in the future, have arisen. Inherent in this appeal, is the plight of 10,000,000 residents and of numerous human enterprises, whose situs is within the 102 counties of Illinois, some within its 1207 incorporated municipalities, the present and future of all, determinable by ordinances or resolutions that may be passed by the unfettered whim of 1309, presently autonomous zoning authorities. This problem is neither new nor local. As is the dissenting opinion herein, others are concerned that Illinois is trying to accomplish, without a statutory enactment, by judicial fiat, or *ad hoc* decision, what is possible only by a statutory enactment. This is the first case in Illinois testing the validity of the "special use", more commonly known as an "exception"; it asserts that no statutory basis for that exists. The majority opinion defies logical analysis and comprehension, the lone citation relied upon therein, is distinguished and rejected in the cogent dissenting opinion. The purposes of zoning in unincorporated county areas, the goals to be sought, the recognition of individual situations and conditions, the policy to be followed, all specifically adjure and empower the county boards and boards of appeals to make "variations" of statutory zoning regulations, only where "there are practical difficulties or particular hardships in the way of carrying out the strict letter" of the

county zoning enabling Act, and to "prohibit uses, buildings or structures incompatible with the character of such districts respectively" and "due allowance shall be made for existing conditions, the conservation of property values, the directions of building developments to the best advantage of the entire county, and the uses to which property is devoted at the time of the enactment of any such ordinance or resolution". (Chap. 34, pars. 152i and 152k.i, Appendix A, *infra*, p. 1). There is no statutory basis for "special uses" (commonly called, "exceptions") in Illinois. In lieu thereof, the majority opinion attempts not only to legislate the "special uses" into the laws of Illinois, but also confuses it with the statutory "variation", by treating two entirely different zoning concepts, as if they were similar, even as has been done by "zoning enthusiasts and administrators" who prepared the disputed Du Page County Zoning Ordinance, here on appeal, as the dissenting opinion tartly notes. It is inconceivable that the Supreme Court of Illinois, when it was not legally possible for Club to establish a highly restricted sports club as a "variation", within an area zoned and used for single-family residence uses on tracts of not less than one acre, and improved with residences ranging in value from $39,000 to $70,000, for no "practical difficulties" or "particular hardship" could be shown by the Club, that that Court could validate the Club's establishment, on the identical tract and location, as a "special use" which is "deemed desirable for the public welfare within a given district . . . but which are potentially incompatible with typical uses herein permitted". (Appendix A, *infra*, pp. 2, 8.) And this after the Du Page County Board of Appeals had refused to allow Club to establish itself on that identical tract, after a public hearing thereon, giving as its reasons and findings that were the Club

to locate there the enumerated purposes of the county zoning enabling Act would be vitiated (Appendix A, *infra*, p. 10.) Thus, without any basis in the laws of Illinois, has the highest tribunal of that State placed its stamp of approval on the still unresolved confusion of the zoning laws of Illinois, and made instability the rule in Illinois: No determined principles shall govern; each situation is to get an *ad hoc* decision as it arises, this case being the first.

The general area herein concerned lies in the extreme northeast corner of Downers Grove Township, in an unincorporated area of Du Page County, Illinois, separated by a narrow paved country road from the Village of Hinsdale, to the east. (See maps: Rec. 5, Appellants' Abst., following p. 85; Rec. 8, Exhibits Appendix, Joint Exhibit 2, Downers Grove Township map 9.)

Prior to October 28, 1958, the specific area of Du Page County, herein concerned, had been zoned "R-2" for single-family dwellings, specifying at least one acre for each residence. Numerous dwellings had been erected in that area, among which are those of certain appellants, whose homes were valued from $42,500 to $70,000, certain ones being contiguous to, others adjacent to a certain, unimproved and vacant tract of approximately six acres.

On October 24, 1958, four days before, Appellee Club had been refused a special use permit, for which it had applied to the board of appeals of Du Page County, of which it had asked for a reclassification of the six-acre vacant tract, which it had bought and intended to use as a highly restricted private sports club for its intended membership of 275 members. The refusal of the board of appeals, to grant the requested special use permit, occurred after hearings conducted by the board of appeals, at which hear-

ing the Appellee Club and its spokesmen, as well as the appellants, and other opponents to the granting of the special use permit, had spoken and produced evidence for the consideration of the zoning board.

In consequence of what proceeded before it, the board of appeals, based its refusal to issue the requested special use permit on the grounds that the proposed private recreation center, in a single-family residential area, zoned only for that specific land use, would be (a) incompatible with the general use and character of the neighborhood, (b) that it would tend to cause considerable depreciation of surrounding property, (c) that it would not accord with the general trend of development of the area, and (d) that it would tend to increase the congestion and hazards on a road designed to accommodate only local traffic.

Despite the refusal of the zoning board to grant the requested special use permit, four days later, on October 28, 1958, the County board, without any hearing, and upon evidence and grounds unknown and unascertained, passed a resolution granting to Club, an appellee, a permit to construct and operate a highly restricted private sports club and accessory building or structures for the administration, operation, maintenance and club house or pavilion facilities including the sale of food and soft drinks, provided that such accessory buildings are are located not less than 150.0 feet from any residential property line; that there be no lighting for the operation of recreational uses at night; that all parking areas shall conform to the regulations governing size, access, design and maintenance of off-street parking areas in the R-1, Single Family Residence District on the six-acre tract concerned. (Rec. 4, Appellants' Abst. p. 83, Appendix A, *infra*, p. 10.)

The resolution of the county board, granting the special use permit to construct an outdoor recreation center, to Club, an appellee, was predicated upon the 1957 Du Page County Zoning Ordinance, which, by its terms, had created a heterogeneous classification which was called "special uses" and defined as:

> "F. SPECIAL USES.
>
> 1. To provide for the location of special classes of uses which are deemed desirable for the public welfare within a given district or districts, but which are *potentially incompatible* with typical uses herein permitted within them, a classification of Special Uses is hereby established." (Emphasis added.) (Rec. 8, Joint Exhibit No. 2, p. 31, Appendix B, *infra*, p. 8.)

The 1957 Du Page County Zoning Ordinance had been enacted, purportedly in accordance with the specific powers, duties and prohibitions set forth in the county zoning enabling Act, enacted in 1935. That Act gave to all county boards only power to regulate, restrict the location of buildings and land for trade, industry, residence and other uses to be specified by a county board, according to use of land, buildings and intensity of use, tempered by a flexibility in "hardship" and "difficulties" situations (variations) to best carry out the purposes of the Act. On the other hand, each board was given the power to prohibit uses, building or structure *incompatible* with the character of respective districts. An admonition was made to each county board: that it make allowance for existing conditions, conserve property values, building development directions to the best interests of the county, and, to uses to which property is devoted whenever a resolution is to be passed. No mention is made of "special uses" (exceptions).

Appellants brought their declaratory judgment proceeding in the Circuit Court of Du Page County, on November 29, 1958, to review the issuance of the special use permit for a highly restricted private sports club to Club, an appellee, by the county board.

The pleadings specified the issues. The complaint set out that the appellants are owners of property abutting or close to the concerned six-acre tract; that the concerned six-acre tract is part of a desirable residential area, zoned since May 1, 1957, as "R-2"; that an appellee, Salt Creek Club, was refused a permit for a private recreation center by the Board of Appeals, after evidence adduced at a on the ground that it would be "incompatible" with the neighborhood, would depreciate surrounding property, would not be in accord with the trend of development, and that it would increase traffic hazards.

The pleadings further alleged, that the county board granted the resolution to give to Club, a permit, without hearing evidence. (This the appellees denied.) That the plaintiffs' real estate has great value, and is valuably improved. (This the appellees denied.) That the value of the properties of the appellants would be depreciated by the proposed activities of the appellee, Club. (This appellees denied.) That the county zoning ordinance is unconstitutional and void and the issued special use permit is void. (This appellees denied.)

The trial court in a fatuous opinion found that the issuance of the special use permit was proper, under the terms of the 1957 Du Page County Zoning Ordinance, which Du Page County Board was empowered to pass, under the terms of the county zoning enabling Act of Illinois. It also found that no findings of fact are required of the county board, in granting a special use permit; that the

county board did not act capriciously; that there was no deprivation of property without due process of law; and that there is vague testimony of damage to the property of the appellants.

On a certificate of importance granted by the trial court, the Supreme Court of Illinois heard the appeal. It determined that (a) the county zoning enabling Act is sufficiently broad to allow the granting of "special use" permits, even though they are potentially incompatible with the character of the zones where they are to be used; (b) a private recreation center may be issued a special use permit in a single-family residence zone; (c) it may not be contended that a special use permit does not have sufficient standards when the county board will weigh the desirability of the proposed use; (d) written findings are not required when the county board grants a special use permit; and (e) restrictions having been made along with the granting of the special use permit, the board's action was not arbitrary and did not deprive appellants of their property without due process of law.

On the rehearing, the dissenting opinion disagreed with the assumptions, reasoning and the result of the majority opinion.

## THE QUESTIONS ARE SUBSTANTIAL

1. In Illinois, there are two statutes on zoning: those dealing with municipalities, with which we are not herein concerned, save in principle, and those dealing with zoning in the counties (pars. 152i, *et seq.*, Appendix A, *infra*, p. 1.)

The Du Page county board in 1957, zoned the area, here concerned, for single-family residence use classifying it R-2, specifying not less than one-acre tracts. For this district, zoned for this use, after a reasoned refusal by the

board of appeals, the county board passed an ordinance permitting an incompatible use—a private recreation center for 275 members—contrary to the legislative intent as expressed in this Act: (a) to carry out the purposes of this Act, (b) to prohibit incompatible uses in each district, (c) to consider existing conditions, (d) to conserve property values, (d) to heed building developments to the best interests of the county and (e) the uses currently made of land; also, (f) not to deprive owners of existing lawful use of their land. The means used, by Du Page county board, was to creat a novel classification, "special use", defined as being "potentially incompatible" and to permit special uses, wherever the county board wished to locate them, thus vitiating the declared basis for the county zoning enabling Act, which evidences the declared legislative intent. (Rec. 4; Appellants' Abst. 84; Appendix A, *infra*, p. 10.)

In the absence of Illinois precedents, the trial court ruled contrary to the national policy declared in the *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 case, and legislative provisions of this Act. In addition, the Supreme Court of Illinois, has refused to apply not only the declared national policy and cautions of the Euclid opinion but also the legislative mandates cautions and prohibitions of this Act.

The total authority empowering county boards in Illinois to zone unincorporated county areas is derived from the county zoning enabling Act of 1935 (Chap. 34, par. 152i *et seq.*, Ill. Rev. Stat., 1957; App. A, *infra*, p. 1), delimited by the statutory enactment that "the common law shall be the rule of decision and shall be considered as of full force until repealed by legislative enactment" (Chap. 28, Ill. Rev. Stat., 1957; App. A, *infra*, p. 1), and also by the Due Process and Equal Protection clauses of the federal and state constitutions. Only within this

area can the police power of Illinois be exercised to discharge its paramount obligation to promote and protect the public health, safety, morals or general welfare of its residents. The enactment into law of "An Act in relation to county zoning" in 1935 was a delegation of that power to the counties to be exercised by them for the accomplishment of those purposes in order to benefit county residents outside of incorporated cities and villages". (*Du Page County* v. *Henderson, et al.*, 402 Ill. 179, 83 N.E. 2d 720; *National Brick Co.* v. *County of Lake*, 9 Ill. 2d 191, 124 NE 2d 879.)

Pertinent provisions of the Act (par. 152i, Appendix A, *infra*, p. 1) declare the policy of Illinois for the respective unincorporated county areas to be for the purposes of public health, safety, morals, comfort and general welfare, conserving property values throughout respective counties shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, residence and other uses specified by respective county boards, and to regulate respective use intensities, to divide respective unincorporated county areas into districts of the number, shape, area, different classes, according to use of land and buildings and use intensity to best carry out the Act's purposes; to prohibit uses, buildings or structures incompatible with the character of each respective district; and to prevent construction work undertaken to avoid the restrictions of the Act; in all enactments under the Act, due allowance shall be made for existing conditions, conservation of property values, the direction of building developments to the best advantage of the entire county, and uses made of property at the time of any enactment; no powers conferred by the Act shall be use to deprive owners of existing property of its then lawful purpose.

Other pertinent provisions of the county zoning enabling Act (par. 152k) specify the procedure which county boards must follow in order to enact a zoning ordinance consonant

with the provisions of that Act, implementing the powers therein granted to county boards, and, inferior to them, the zoning commissions and boards of appeals, along with the respective powers, duties and procedures of each, respectively. To county zoning commissions appointed by county boards are given the power, authority and duties under the procedure specified in the Act, which shall be to recommend boundaries of district and appropriate regulations to be enforced therein, to prepare a tentative report and proposed ordinance for all unincorporated county areas, to hold noticed public hearings thereon, and after 30 days to submit a final report and a proposed ordinance to the respective county boards, which report and proposed ordinance the respective county boards may enact, alter or refer back to the respecfive zoning commissions.

Other provisions (par. 152k.1) for the unincorporated county areas empower respective county boards and boards of appeals to determine and vary the application of the regulations of the Act consonantly with their general purpose and intent and in accordance with their general or specific rules, in cases where "practical difficulties or particular hardship" in carrying out the strict letter of the regulations relating to use of land or buildings, provided a variation shall be made by a county board only after a properly noticed hearing before the board of appeals: variations may be made by a county board only when preceded by a favorable report of the board of appeals and passed by a three-fourths vote of all members of the county board; all variations shall be accompanied by reasoned findings of fact. Boards of appeals shall consist of 5 members, shall hold open meetings, keep minutes of proceedings which shall be public record (par. 152k.2), hear and determine administrative enforcement officers of the Act, shall hear all reviews and matters before it, a concurring vote

of four-fifths of members shall be required to determine or reverse orders of any enforcement official or in favor of any applicant or to effect any variation or modification in any county board enactment (par. 152k.3), appeals to boards of appeals shall be duly noticed to parties who may appear, and appeals must be decided promptly, and the zoning board may reverse, affirm or modify the appealed matter.

Pertinent parts of par. 152.m, dealing with amendments and variations permit the amendment of regulations imposed and districts created under authority of the Act, after their effective enactment, but no amendments to them shall be made without a hearing before the board of appeals, preceded by proper advance notice in an adequate paper.

Within the preceding, the majority opinion of the Supreme Court of Illinois found its basis for:

> "In our opinion, a residual category of those special uses which can not, without distortion, be included in the customary classifications, is permissible as a means of implementing the powers conferred by the statute." (App. B, *infra*, p. 23)

The dissenting Chief justice deftly demolished that assumption, logic and conclusion.

2. Vigorously criticized by the dissenting Chief Justice, the confusions of the majority opinion have unwittingly frustrated the intent of the legislature, defeated the purposes of the county zoning enabling Act, validated the contradictory provisions of the Du Page County Zoning Ordinance, 1957, and made of it an absurdity; all in violation of the due process and equal protection clauses of both the federal and state constitutions, to the detriment of Appellants.

The county zoning enabling Act was enacted in 1935. Last amended in 1959, it still gives no statutory basis for

"special uses". Prior to 1935, the common law prevailed. In 1947, the Supreme Court of Illinois said:

> "It was the intention of the legislature that a county board which decided to come under the terms of the Act by the adoption of a zoning ordinance should be bound by the powers, conditions and restrictions contained in the Act. To hold otherwise, would nullify the restrictions and conditions of the County Zoning Act. . . . Where a special Act is repugnant to or inconsistent with a former general statute, a *pro tanto* repeal of the prior enacted general statute will be implied or an exception will be grafted upon the earlier Act by the later one". (Citing cases) (*County of Lake* v. *John F. Cuneo*, 333 Ill. App. 164, 170.)

The general view on zoning legislation, as in Illinois, is that there must be a substantial relation to public health, safety, morals or general welfare. That opinion recites the general attitude toward zoning statutes, and which prevails in Illinois; counties have only the powers granted by statute; the statute must have a substantial relation to public health, safety, morals and general welfare; where there is none the county cannot confiscate property under the guise of zoning nor can it confiscate property or inflict injury on an owner; factors to be considered are the character of the neighborhood, use of nearby property, possible decrease in value of nearby properties compared with gain to the public and hardship on the individual owner; zoning laws that gain the public little while seriously harming an individual or inflicting loss on him cannot be sustained. (*Ferguson* v. *Russell*, 270 Ill. 304; *Midland Coal Corp.* v. *County of Knox*, 1 Ill. 2d 200; *Hannifin Corp.* v. *City of Berwyn*, 1 Ill. 2d 28; *Trust Company of Chicago* v. *City of Chicago*, 408 Ill. 91; *National Brick Co.* v. *County of LaSalle*, 9 Ill. 2d 191.)

By a simple judicial fiat, merely calling exceptions "special uses" in Illinois, exceptions are now transformed into another kind of those uses which cannot be readily included

in trade, industry, residence and other uses (chap. 34, par. 152i, Appendix A, *infra*, p. 1) which a county board is empowered to enact in its county zoning ordinance:

> "In our opinion, residual category of those special uses which can not, without distortion, be included in the customary classifications, is permissible as a means of implementing the powers conferred by the statute." (App. B, *infra*, p. 23)

Although vigorously criticized by the dissent of the Chief Justice, by those 34 words the majority opinion of the Supreme Court of Illinois, in this case, has unwittingly frustrated the intent of the legislature, defeated the purposes of the county zoning enabling Act, validated the absurd and contradictory provisions of the Du Page Zoning Ordinance, 1957, violated both the due process and equal protection guarantees of both the federal and state constitution, and loosed havoc in Illinois beyond present comprehension. By that pronouncement, the Supreme Court of Illinois not only begs the question, but deftly disposes of the case, the crux of it being, first, the necessity of recognizing and distinguishing the nature and function of variations as compared with exceptions, and, second, the source of and nature of specific powers by the exercise of which county boards can enact county zoning ordinances that contain provisions for granting variations, and, third, if provisions for exceptions are also among the ordinance provisions, just what exceptions can be specified in the ordinance and how they are to be granted. All discussion anent these matters is omitted from the main opinion herein.

Worse yet, the majority opinion itself is an *ad hoc* decision; it avoids any real determination of the fundamental issues involved for the guidance of other tribunals of Illinois. Instead, it burdens the residents and owners of Illinois with the necessity and expense of obtaining *ad hoc*

decisions, as other situations arise throughout the state, with the result, foretold in the words of the dissenting Chief Justice: "The ingenuity of members of our profession could conceivably conjure up so many 'unique' situations which would require applications of special use procedures that *ad hoc* determination could become the rule rather than the exception". Unless this be rectified, each of the 1309 zoning authorities located in the 102 counties of Illinois, currently independent and autonomous can readily make havoc of zoning in Illinois, in short order, which, in turn, will bring more *ad hoc* zoning cases to the Supreme Court of Illinois for determination.

The seven specified purposes of the Act have been frustrated and its intent (par. 152i, App. A, *infra*, p. 1) has been avoided by the opinion herein on appeal. The "special use device" ("exceptions", in zoning law) unmentioned in the Act, but alluded to in the opinion, even when specifically empowered by a statutory provision, as is done in several states (the permitted exceptions must be listed in each ordinance and must subserve general welfare and protect community interests) is always accompanied and regulated by statutory safeguards, equivalent in force and function to those with which Illinois accompanies and regulates the granting of variations in Illinois (par. 152k.1, Appendix A, *infra*, p. 3): "practical difficulties or particular hardship" must be proved to enable petitioner to have the benefit of the permitted flexibility in the application of regulations enacted under the granted powers of the Act. Conversely, the specific function and purpose of exceptions is, even as that of a succession of ink smears purposefully placed upon a sheet of graph paper: to radically change the existing demarcations and character of certain predetermined portions of a general area.

The difference between "special uses" (exceptions) and "variations" (variances) is:

> "To briefly summarize the, let us say that an *exception* is a permission given by the board, properly authorized by ordinance in specific cases, for an applicant to use his property in a manner contrary to the provisions of an ordinance, provided such use subserves the general welfare and protects community interests. A *variance*, on the other hand, is an authorization by a board, usually on appeal, granting relief and doing substantial justice in the use of his property by a property owner, where, owing to special conditions, a literal enforcement of the provisions of the ordinances will result in unnecessary hardship." (Zoning Law and Practice, E. C. Yokley, 2nd ed., vol. 1, sec. 133, p. 134, 1953.)

(For an extended discussion of this subject, see also, The Law of Zoning, James Metzenbaum, 2nd ed., vol. 1, Chap. IX-f-2-(b), p. 813 *et seq.*, 1955; also, The Law of Zoning and Planning, Charles A. and Arden H. Rathkopf, vol. 1, chap. 50, pp. 777-784, 1957 and cumulative supplement, 1959, cases cited in all foregoing texts; also, Zoning Laws-Variances, Exceptions, Amendments, Floyd L. Harding, 29 Boston University Law Review 406; Variations, Exceptions and Special Uses, Andrew J. Dallstream and Robert S. Hunt, 1954 University of Illinois Law Forum 213, (Messrs. Dallstream and Hunt, in the instant appeal represent Salt Creek Club, an appellee, and their position, herein, has altered from what it was then stated to be). (See, also, Special Use: A New Concept in Illinois Zoning, Richard L. Furry, 48 Illinois Bar Journal 488, March, 1960, wherein is discussed the instant appeal, then on appeal in Illinois, and stated, page 502: "Nevertheless, until such time as the procedure is given statutory recognition in Illinois and appropriate standards and practices are legislatively established to govern the granting of special uses permits, the

future of the device will remain shrouded in uncertainty in this state"; also, Illinois decisions and articles annotated thereto.)

The statutory origin of variations (par. 152k.1, App. A. *infra*, p. 3) and the required safeguards, limits the county board, on appeal from the board of appeals, from any abuse of discretion, requiring that all enactments or resolutions be in consonance with the purposes, intent, powers, admonitions prohibitions and procedures of the Act, are unchanged, even by amendments of 1959. None of these provisions mention or apply to "the special use device" yet, according to the opinion, they also apply to that "a residual category . . . permissible as a means of implementing the powers conferred by the statute." (Rec. p. 18, App. B., *infra*, p. 23.) A plain reading of Act repels that conclusion: not only is there no mention of "special use", but, the opinion of that court has made an absurdity of the Du Page county zoning ordinance. The provisions of that ordinance, untouched by the statutory safeguards regulating the granting of variations, leave to the unfettered discretion of all county boards and boards of appeal, the power to nullify every enacted detail of every zoning plan, ordinance, resolution and variation, by the exercise of their unfettered discretion without even that majority of votes required for granting variations, let alone the required reasoned findings of fact required for variations. Save for the dissent of the Chief Justice, the majority Illinois opinion, by its ill-conceived, confused and inconsistent statements and omissions, validated the Du Page County Zoning Ordinance has unwittingly sanctioned chaos.

The Illinois decision, herein on appeal, should not be countenanced; it inaugurates another "Illinois merry-go-round", this time in zoning law.

"We should neither delay nor deny justice, nor clog its administration, with so useless and harmful procedural strangling of federal constitutional rights." (*Marino* v. *Ragen, Warden*, 332 Ill. 561)

*Fair* v. *Marsteller*, 2 Cranch 19; *Adams, qui tam Woods*, 2 Cranch 336; *Yick Wo* v. *Hopkins, Sheriff*, 118 U.S. 356; *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365; *Zahn et al.* v. *Board of Public Works*, 274 U.S. 325; *Nectow* v. *City of Cambridge, et al.*, 277 U.S. 183; *Marino* v. *Ragen, Sheriff*, 332 U.S. 561; *A. L. A. Schechter Poultry Corp., et al.*, v. *United States*, 295 U.S. 495; *Cherokee Intermarriage Cases*, 203 U.S. 76; *City of San Jose* v. *Lynch*, 52 P. 2d 919; *Lindley* v. *Cross*, 31 Ind. 106, 99 Am. Dec. 610; *People* v. *Hintichsen*, 111 Ill. 223; *Aura G. Arms, Admx.* v. *Frederick Ayer, et al.*, 192 Ill. 601; *Guy Bruce, Appellee* v. *Mollie McCormick*, 396 Ill. 482.

3. Because of overzealousness or lack of comprehension, "zoning enthusiasts and administrators" under the battle cry "Streamline Zoning in Illinois" are attempting to by-pass the firm obstacles purposefully placed as safeguards in Illinois zoning law in anticipation of just such folly; the sage wisdom of Illinois zoning laws, as enacted, allows all changes necessary, seasonably, but only after successfully adhering to all standards and guides in all of the required procedural steps, in order to allow time for a full comprehension, exploration, consideration and determination of all consequences that might flow from each proposed change in the size, location, shape or character of each district, and of each amendment, and of each variation *before each is made, rather than afterwards.*

4. Unless the powers, effect and consequences implicit in the concepts, enactments and administration of the components of zoning law and the enactments of each authority in the United States be adequately comprehended, the unscrupulous will be left free, subtly, insidiously and effec-

tively to circumvent the application of that fundamental principle settled by this Court in *Brown et al* v. *Board of Education of Topeka, et al.*, 347 U.S. 483, by the ingenious contriving of provisions in local zoning ordinances, or in their application. For the power to zone, can determine the *situs* and future of all tangible things, animate and inanimate. Its full significance is beginning to be appreciated. Those in places of influence or power should not be permitted to wield it, in any manner contrary to or infringing upon the guarantees that protect all in the Constitution of the United States.

It is submitted that the decision of the Supreme Court of Illinois is contrary to those fundamental guarantees of the federal and state constitutions, and that unless reversed, the consequences will far outweigh the immediate result of that decision. We believe that the questions presented by this appeal are substantial and that they are of great public importance.

Respectfully submitted,

ARTHUR FRANKEL
NATHAN GLICK
LAWRENCE E. GLICK
*Counsel for Plaintiffs-Appellants.*

## APPENDIX A.

Chap. 28, Ill. Rev. Stat. 1957, provides:

Sec. 1. Rule of decision

That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second chapter of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

APP. A 2

Chap. 34, Ill. Rev. Stat. 1957, provides:

### ZONING

AN ACT in relation to county zoning. (Approved June 28, 1935. L.1935, p. 689.)

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

152i. Counties may regulate and restrict location and use of structures.] § 1. For the purpose of promoting the public health, safety, morals, comfort and general weifare, conserving the values of property throughout the county, and lessening or avoiding congestion in the public streets and highways, the board of supervisors or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, industry,

residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses, and to establish building or setback lines outside the limits of cities, villages and incorporated towns; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, and the intensity of such use, as may be deemed best suited to carry out the purposes of this Act; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder: Provided, that permits with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes shall be issued free of any charge. In all ordinances or resolutions passed under the authority of this Act, due allowance shall be made for existing conditions, the conservation of property values, the directions of building development to the best advantage of the entire county, and the uses to which property is devoted at the time of the enactment of any such ordinance or resolution.

The powers by this Act given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted; nor shall they be exercised so as to impose regulations or require permits with respect to land used or to be used for agricultural purposes, or with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes upon such land except that such buildings or structures for agricultural purposes may be required to conform to building or set back lines * * *.

Nothing in this act shall be construed to restrict the powers granted by statute to cities, villages and incorporated towns as to territory contiguous to but outside of the limits of such cities, villages and incorporated towns. The powers granted to counties by this act shall be treated as in addition to powers conferred by statute to control or approve maps, plats or subdivisions.

152j. Zoning commission—Ordinance or resolution—Hearing—Land adjacent to municipality.] § 2. The county board in counties which desire to exercise the powers conferred by this Act, shall provide for a zoning commission of not less than three nor more than nine members whose duty it shall be to recommend the boundaries of districts and appropriate regulations to be enforced therein, such commission to be appointed by the chairman or president of the county board, subject to confirmation by the county board. Such commission shall prepare a tentative report and a proposed zoning ordinance or resolution for the entire county outside the limits of cities, villages and incorporated towns. After the preparation of such tentative report and ordinance or resolution, the commission shall hold hearings thereon and shall afford persons interested an opportunity to be heard. • • •

Within thirty (30) days after the final adjournment of such hearings the commission shall make a final report and submit a proposed ordinance or resolution to the county board. The county board may enact the ordinance or resolution with or without change, or may refer it back to the commission for further consideration. • • •

152k.1 Variation by board of appeals—Variation by ordinance or resolution.] § 3.1. The regulations by this Act authorized may provide that a board of appeals may determine and vary their application in harmony with their

general purpose and intent and in accordance with general or specific rules therein contained in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of such regulations relating to the use, construction or alteration of buildings or structures or the use of land; or the regulations by this Act authorized may provide that the county board may, by ordinance or resolution determine and vary their application in harmony with their general purpose and intent and in accordance with general purpose and intent and in accordance with general or specific rules therein contained in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any such regulations relating to the use, construction or alteration of buildings or structures or the use of land; provided, however, that no such variation shall be made by such county board without a hearing before the board of appeals. No variation shall be made by ordinance, resolution or otherwise except in a specific case and after a public hearing before a board of appeals of which there shall be at least 15 days notice of the time and place of such hearing published in a newspaper of general circulation in such county, said notice to contain the particular location for which the variation is requested as well as a brief statement of what the proposed variation consists.

Where a variation is to be made by ordinance or resolution, upon the report of the board of appeals such county board may by ordinance or resolution without further public hearing adopt any proposed variation or may refer it back to the boad of appeals for further consideration and any proposed variation which fails to receive the approval of the board of appeals shall not be passed except by the favorable vote of three-fourths of all the members of the county board. Every such variation, whether made by the

board of appeals directly or by ordinance or resolution after a hearing before a board of appeals shall be accompanied by a finding of fact specifying the reason for making such variation.

152k.2 Board of appeals.] § 3.2. The county board shall provide for the appointment of a board of appeals consisting of five members to serve respectively for the following terms: One for one year, one for two years, one for three years, one for four years and one five years, the successor to each member so appointed to serve for a term of five years. • • • Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of such board shall be open to the public. Such board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions. Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the board shall immediately be filed in the office of the board and shall be a public record. • • •

152k.3 Hearing and decision of appeals—Appeals, taking of—Effect of appeal.] § 3.3. The board of appeals shall also hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance or resolution adopted pursuant to this Act.

It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance or resolution or under the terms of this Act. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official or to decide in favor

of the applicant any matter upon which it is required to pass under any such ordinance or resolution, or to effect any variation in such ordinance or resolution, or to effect mend any variation or modification in such ordinance or resolution to the county board. An appeal may be taken by any person aggrieved. • • • Such appeal shall be taken within such time as shall be prescribed by the board of appeals by general rule by filing with the officer from whom the appeal is taken and with the board of appeals a notice of appeal, specifying the grounds thereof • • •

An appeal stays all proceedings in furtherance of the action appealed from. • • •

152k.4 Time for hearing of appeal—Appearance—Dispositions—Judicial review.] § 3.4. The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent, or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. • • •

152m. Amendment of regulations and districts.) § 5. The regulations imposed and the districts created under the authority of this Act may be amended from time to time by ordinance or resolution, after the ordinance or resolution establishing same has gone into effect, but no such amendments shall be made without a hearing before the board of appeals. At least fifteen days notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such county, and a hearing shall be held in each township or road dis-

trict affected by the terms of such proposed amendment, except that for the consideration of general amendments to a County zoning ordinance, hearings may be held in the County Court House instead of in each township or road district. In case of written protest against any proposed amendment, signed and acknowledged by the owners of twenty percent of the frontage proposed to be altered, or by the owners of twenty percent of the frontage immediately adjoining or across an alley therefrom, or by the owners of twenty percent of the frontage directly opposite the frontage proposed to be altered, or in cases where the land affected lies within one mile and one-half of the limits of a zoned municipality, by the city council or president and board of trustees of the zoned municipality with limits nearest adjacent, filed with the county clerk, such amendment shall not be passed except by the favorable vote of three-fourths of all the members of the county board.

152o. Proceedings to restrain and prevent violations—Penalty.] § 7. In case any building or structures is erected, constructed, • • • or land is used in violation of this Act or of any ordinance, resolution or other regulation made under authority conferred thereby, • • • or any person the value or use of whose property is or may be affected by such violation, in addition to other remedies, may institute any appropriate action or proceedings in equity to prevent such unlawful erection, construction . . . or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure or land or to prevent any illegal act, conduct, business, or use in or about such premises.

The Du Page County Zoning Ordinance, 1957, provides:

Section III. Zoning Districts

A. Districts. For purposes of this ordinance, Du Page County is hereby organized in the following districts:

1. Residential
   R.1 Single-Family Residence District
   R2 Single-Family Residence District

Section IV. General Provisions.

F. Special Uses.

1. To provide for the location of special classes of uses which are deemed desirable for the public welfare within a given district or districts, but *which are potentially incompatible* with typical uses herein permitted within them, a classification of Special Uses is hereby established. (Emphasis added.)
2. Uses as hereinafter enumerated, which may be proposed for classification as Special Uses, shall be considered at a Public Hearing before the Zoning Board, and its report of finding of facts and recommendations shall be made to the County Board following the Public Hearing. The County Board may allow the Special Use in the district indicated, under the conditions stipulated hereinafter, and may impose such additional conditions as it considers necessary to protect the public health, safety and welfare.

Section V. Residential Districts

A. R1 Single-Family Residence District

1. Permitted Uses. The following uses are permitted:
   a. Single-family detached dwellings . . .
2. Special Uses. The following uses are permitted as Special Uses:

b. Public or private outdoor recreation centers; as polo fields, fishing ponds, hunt and gun clubs, conservation clubs, archery ranges, picnic grounds, par-3 golf courses (not including commercially operated driving ranges, or miniature golf courses), and accessory buildings or structures for administration, operation, maintenance and club house or pavilion facilities including sale of food and soft drinks provided that accessory buildings are located not less than 150 feet from any residential property line. Lighting for operation of recreational uses at night is not permitted.

B. R2 Single-Family Residence District

1. Permitted Uses. Those permitted in an R1 District.
2. Special Uses. Those permitted in an R1 District.

. . .

5. Lot Area Per Dwelling. There shall be provided a minimum of one acre of lot area for each dwelling. . . .

Section VIII. Administration.

B. Zoning Board.

3. Jurisdiction.

c. The County Board may by Ordinance or Resolution may determine and alter the application of this ordinance in harmony with the general purpose and intent and in accordance with the general or specific rules herein contained for special uses, and in cases where there are practical difficulties or particular hardship in the way of carrying out the strict

letter of any of the provisions of this ordinance relating to use, construction . . . of buildings or structures, or the use of land; provided that no special use shall be authorized . . . by the County Board except in a specific case until after a hearing provided before the Zoning Board. The Zoning Board in its recommendation to the County Board shall set forth a finding fact specifying the reason for making or rejecting such . . . special use.

d. No . . . issuance of special use permits, unless after public hearing as provided for in this article, the Zoning Board shall find that such . . . special use will not . . . (3) diminish the value of land and buildings throughout the county, (4) increase traffic congestion hazards in the public streets and highways, nor (5) otherwise impair the public health, safety, comfort, morals or general welfare of the inhabitants of said county.

JOINT EXHIBIT NO. 3.
(Pages 1, 5 and 6)
October 28, 1958

Proceedings of the Board of Supervisors of Du Page County, Illinois at an adjourned meeting held in the Court House in Wheaton, Illinois on Tuesday, the 28th day of October, A. D. 1958 pursuant to adojurnment.

Meeting called to order with Chairman Waterfall presiding.

On roll call all members present except Supervisors Murphy, Dunton, Holm, and Walt Swanson.

. . . . . .

On motion of Supervisor Harner, the following resolution was declared approved and adopted. On roll call all voted "aye" except Supervisors Russell Swanson, Ronske, James, Kletschke, and Hiltenbrand who voted "no." Motion carried.

## RESOLUTION

WHEREAS, a public hearing was held in the Hinsdale Memorial Building, Hinsdale, Illinois on August 21, 1958, before the Zoning Board of Appeals and notice of said hearing was duly given, and

WHEREAS, a petition was presented requesting the issuance of a Special Use Permit on the property hereinafter described, and

WHEREAS, the Zoning Board of Appeals made the following finds and recommendations:

> "That the property under consideration is proposed to be used as a private swimming and tennis club by a not for profit organization having about 200 members; that it consists of about six acres of land situated on a narrow country road in the center of a neighborood valuable residences; that the issuance of this permit would permit an activity that would be incompatable with the general use and character of the neighborhood; that it would tend to cause considerable depreciation of surrounding property; that it would not be in accord with the general trend of development of the area and that it would tend to increase the congestion and hazards on a road designed to accommodate only local traffic," and

WHEREAS, the Board of Supervisors of Du Page County, Illinois does not concur in the aforesaid findings and in the recommendations of the Zoning Board of Appeals,

NOW THEREFORE, BE IT RESOLVED by the Board of Supervisors of Du Page County, Illinois that a Special Use Permit be granted to the Salt Creek Club, Incorporated, Hinsdale, Illinois, allowing the construction and operation of a private outdoor swimming and tennis club and accessory buildings or structures for administration, operation, maintenance and club house or pavilion facilities including the sale of food and soft drinks, provided that such accessory buildings are located not less than 150.0 feet from any residential property line; that there be no lighting for the operation of recreational uses at night; that all parking areas shall conform to the regulations governing size, access, design and maintenance of off-street parking areas in the R-1, SINGLE FAMILY RESIDENCE DISTRICT on the property hereinafter described:

The East half of the Northeast quarter of the Northeast quarter of Section 2, Township 38 North, Range 11 East of the Third Principal Meridian, (except the North 549 feet, and except the East 2 rods for road, and except the South 110 feet of the North 1210 feet, and except the South 110 feet).

BE IT FURTHER RESOLVED that a certified copy of this Resolution be transmitted by the County Clerk to the County Zoning Department, the State's Attorney and C. J. Scofield, Attorney 101 S. Washington Street, Hinsdale, Illinois.

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## APPENDIX B.

APP. B 1

Opinion of the Circuit Court of Du Page County, rendered April 6, 1959. (Rec. 4 Appellants' Abst. pp. 76-82.)

### OPINION-TRIAL

Gentlemen, in this case I have studied the briefs and the testimony, and I have notes on the testimony. I am going to reverse my usual procedure in giving a decision by announcing my decision first and then giving you my reasons.

I feel obliged to find in favor of the defendants in this case, and I will tell you why. I will take Mr. Woodward's points and authorities one at a time and give you my impressions and findings on those various points.

Point I (b). "Special use permits are not authorized or provided by the enabling act of the legislature."

We have to go, of course, to Section 152i, "Zoning", to find our answer to that point. This, I believe, is one of the main points and one of the most difficult points in this case. The section of the statute reads:

> "For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, and lessening or avoiding congestion in the public streets and highways, the board of supervisors or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures, and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses, and to establish building or

setback lines outside the limit of cities, villages and incorporated towns into districts of such manner, shape, area and of such different classes, according to the use of land and buildings, and the intensity of such use, as may be deemed best suited to carry out the purposes of this Act; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alterations or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder."

There is other verbiage in this section of the Act, but for the most part that is the controlling statute which permits counties to have and pass a zoning ordinance.

Now, wherein can we read into that section that I have read the right of the county board to have a special use provision in their ordinance? It is different from a variation. A variation is a change, an actual change in the zoning ordinance as such, or the application of the ordinance to a piece of property.

I can see where the Courts might have said or would have said that in granting a variation the legislative body did not have authority to do that without special statutory enactment, and therefore the statute was amended to permit variations; but as to special uses, I think we have a different problem, if we can call it a problem.

The county board in adopting a zoning ordinance could have permitted the various uses which have been listed in the ordinance as special uses in any one of the various categories which they set up in R-1, R-2, R-3 and so forth.

The board, however, felt that as to certain uses they should have some measure of control, and the method by which they exercise that measure of control was to have the special use provision.

They actually provide in Section R-1 of the ordinance and R-2, residential areas, that the type of uses set forth in the complaint in this case could be used in that area provided a special use permit was granted.

As I said before, the Board could have permitted that at the outset in the ordinance without providing for any special use, and it seems to me that the county board would also have the right under this section of the statute to grant the right to use property in this area for recreational facilities of this kind after a hearing was had by the Zoning Board of Appeals and an ordinance passed wherein certain restrictions could be imposed.

The ordinance provides for these restrictions, and it seems to me that the granting of a special use permit can be read into that section of the statute.

Point 1 (a). "Said ordinance is vague in that no standard or guides are prescribed for the granting of special uses."

I don't believe the ordinance is vague, as long as they comply with the original ordinance respecting the special use.

Under Special Uses, paragraph b on page 46 of the ordinance reads:

> "Public, or private outdoor recreation centers; as polo fields, fishing ponds, hunt and gun clubs, conservation clubs, archery ranges, picnic grounds, par-3 golf courses (not including commercially operated driving ranges or miniature golf courses), and accessory buildings or structures for administration, operation, maintenance and club house or pavilion facilities including sale of food and soft drinks providing that accessory buildings are located not less than 150 feet from any residential property lines. Lighting for operation of recreational uses at night is not permitted."

That is in the ordinance. That is part of the R-2 specifications for these facilities. The only thing that they have to have is this special permit to operate and to establish these facilities.

I don't believe in that respect that the ordinance is vague. It is very specific. As I said before, the county board could have passed the ordinance and permitted this in the R-2 classification without any hearing, without any necessity of securing any special use permit as such.

Section II. "Resolution of the Board of Supervisors authorizing the special use permit in question is void for the following reasons:

"(a) The Board of Supervisors arbitrarily and capriciously ignored the findings of fact of the Board of Zoning Appeals."

Well, they did not follow the recommendation of the Board of Appeals. There is no requirement that a legislative body must follow the recommendations of their committee which is established according to statute to make these investigations.

The Board of Zoning Appeals held their hearing, which was a lengthy hearing. People were heard, and they made their recommendation to the Board.

In view of the fact that they don't have to follow it, I don't believe we can say they were arbitrary or capricious. I don't believe it would have any bearing on the action of the Board.

"(b) The granting of the special use is not supported by any findings of fact."

I believe I made my thoughts and ideas on this quite clear at the time of the hearing. As I said then, it is not necessary for the county board in passing an ordinance to state on what bases the ordinance is passed or adopted.

The findings of fact which are in the ordinance for the Board of Appeals are primarily and solely for the benefit and guidance of the county board at the time they are working on and discussing for passage or adoption the particular ordinance involved.

"(c) The County Zoning Ordinance contemplates the making of findings of fact."

I don't believe it does. It contemplates the making of finding of facts only by the Zoning Board of Appeals for the benefit of the county board.

"(d) The granting of said special use is contrary to the spirit of the County Zoning Enabling Act of the legislature."

As to that point, I don't quite follow the meaning of it. I don't know how you can read a spirit into an act. Zoning is a regulatory action, a police power of the state and county.

Its purpose is to regulate the use of private properties for the public good. Anything that does that would be in the spirit of the act. It would seem to me that a special use provision as far as the general public is concerned is a good provision.

As far as private property owners are concerned, I don't know where one particular individual is concerned.

I think this pretty much blends into Mr. Woodward's final point, that the application of this special use as applied to plaintiffs' property is a violation of due process of law.

There is no question but what occasionally in the application of police powers one person's property may be damaged or he may be deprived of some special right by virtue of the police power being enacted for the public good.

In determining whether the exercise of the police power is unconstitutional as to an individual property, we must take into consideration the fact as to whether or not the public good is being served and whether the public good is greater than the damage which may be had to the particular individual's property.

There has been some testimony here regarding damage to plaintiffs' properties. However, it is vague. It isn't too concise, and it was met by testimony and witnesses on behalf of the defendants. There is no question but what one person may consider this use in the neighborhood a detriment to his property, but you might get another person or two people who would consider it an asset and would like to live in the vicinity of a park and recreation area of this kind.

We have to have these areas. They are recreational areas for physical development, such as swimming pools and tennis courts, and they are necessary to our way of life. We have to have them. The county board took that into consideration at the time they passed this ordinance.

They placed them in residential areas. It is logical to have them in residential areas where they are close for the childrn to get to. Yet they felt that they should have some control.

Considering all of the points that have been raised, I believe that the ordinance is valid and that the resolution that was passed was legal.

## Opinion—Supreme Court of Illinois

(Opinion filed March 31, 1960—Modified on Denial of Rehearing May 16, 1960—No. 35389—Judgment Affirmed)

Anthony C. Kotrich *et al.*, Appellants, v. The County of Du Page *et al.*, *Appellees.*

Mr. Justice Schaefer delivered the opinion of the court:

This is a declaratory judgment proceeding which involves the validity of a "special use" permit granted by the defendant, the board of supervisors of Du Page County, to the defendant, Salt Creek Club, under the terms of the Du Page County zoning ordinance. The primary issues concern the statutory authority of the county to provide for "special uses" in its zoning ordinance, and, if the authority exists, the conditions that govern its exercise.

The defendant club is a not-for-profit corporation organized for social, educational, and athletic purposes. It owns the property in question, a six-acre parcel of land now zoned for R-2 single family residence use. On this land it proposes to build a clubhouse, a swimming pool, tennis courts and a parking area for use of its anticipated membership of 275 families.

The club applied to the zoning board for a special use permit under the county ordinance, to allow the construction of a private outdoor recreation center on the property. The board conducted a hearing and recommended to the county board that the special use permit be denied.

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Notwithstanding this recommendation, the county board passed a resolution granting the permit. The plaintiffs, who are adjacent property owners, commenced this suit in the circuit court of Du Page County to challenge the permit and the zoning ordinance under which it was granted. From a judgment sustaining the validity of the ordinance and the permit, they appeal directly to this court. The trial judge has certified that the validity of a county zoning ordinance is involved and that the public interest requires a direct appeal to this court. Ill. Rev. Stat. 1959, chap. 110, par. 199.

The special use is a relatively new method of land use control. Zoning ordinances embodying this technique retain the usual residential, commercial, and industrial zones, specifying the uses permitted in each zone. For each zone, however, special uses are also established which are permitted within the zone only if approved by the zoning board or the governing legislative body. The Du Page County ordinance follows this general scheme, and it specifies private outdoor recreational facilities among the special uses which may be permitted in the R-2 single family residence zone.

Among other special uses permitted in this zone are colleges and universities, public outdoor recreational centers, rest homes, hospitals and sanitariums, planned developments of not less than 40 acres, and "public service uses" such as electric and telephone substations, filtration plants, and fire and police stations. The first contention advanced by the plaintiffs is that the County Zoning Enabling Act (Ill. Stat. 1957, chap. 34, par. 152i, *et seq.*) does not authorize counties to employ this method. In support of this contention they argue that since the special use technique is

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not mentioned in the act, and indeed did not exist at the time the act was adopted in 1935, the legislature could not have intended to authorize it. Their position is that the legislature must specifically grant counties the power to adopt special use provisions, as it has done in the case of variations and amendments, and as legislatures of some other States have done.

They note also that procedural safeguards limit the exercise of administrative and legislative discretion with respect to variations and amendments. Written findings of fact must accompany every variation, and any variation rejected by the zoning board of appeals can be approved only by a three-fourths majority of the legislative body. The same extraordinary majority is required to approve any amendment if 20% of adjacent landowners object. It is argued that the legislature has thus indicated its intention that deviations from the established zoning pattern should be permitted only by the procedurally restricted methods included in the act.

Carl L. Gardner, a planning and zoning consultant, testified that the special use technique developed as a means of providing for infrequent types of land use which are necessary and desirable but which are potentially incompatible with uses usually allowed in residential, commercial and industrial zones. Such uses generally occupy a rather large tract of land. The can not be categorized in any given use zone without the danger of excluding beneficial uses or including dangerous ones. A typical example was presented in *Illinois Bell Telephone Co.* v. *Fox*, 402 Ill. 617, where this court affirmed a judgment ordering a special use permit to issue for construction of a telephone exchange in a residential district.

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Instead of excluding such uses entirely from certain zones because of the harm they might cause, or, despite the potential harm, including them because of the benefits they will bring, the special use technique allows a more flexible approach. It contemplates that the county board may permit these uses when desirable and, if necessary, impose conditions designed to protect nearby property owners. This seems to be an effective method of dealing with a narrow but difficult problem of land use control. Approximately 25 municipalities and counties in Illinois have incorporated it in their zoning ordinances, and the record shows that its use is increasing.

It is true that the procedural restrictions prescribed for amendments *for* and variations as well as the standards prescribed for variations, evidence a legislative plan to guarantee property owners some protection from piecemeal changes in the general zoning scheme by *ad hoc* determinations with respect to particular pieces of property. And since granting a special use permit involves an *ad hoc* judgment which may affect surrounding property owners in the same way as a variation or an amendment, unlimited application of the special use technique *would undermine the protection contemplated by the statute* to land uses that can readily be accomodated within the customary categories would undermine the protection contemplated by the statute. But unlimited application of the special use technique is not required to meet the problem it was designed to solve. Only those infrequent uses which are beneficial, but potentially inconsistent with normal uses in the various zones, need be included.

The statute authorizes the board of supervisors "to regulate and restrict the location and use of buildings, struc-

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tures and land for trade, industry, residence and other uses which may be specified by such board, * * *; to divide the entire county * * * into districts of such number, shape, area and of such different classes, according to the use of land and buildings, * * * as may be deemed best suited to carry out the purposes of this Act; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; * * *." (Ill. Rev. Stat. 1959, chap. 34, par. 152i.) In our opinion, a residual category of those special uses which can not, without distortion, be included in the customary classifications, is permissible as a means of implementing the powers conferred by the statute.

Applying these criteria, we think that a private country club such as that involved in the present case may properly be classified as a special use in a single family residence zone. Such uses of land are often found in residential areas. Proximity to a club may increase the desirability of land. On the other hand, a club may also produce increased noise from bathers, tennis players, social functions and automobiles. If the parking area is not properly designed, headlights may shine in neighboring houses; if it is not large enough members' automobiles will overflow onto neighboring streets. Increased traffic may produce safety hazards. Whether these undesirable consequences will occur depends upon the design of the club's facilities and its location within the zone. In such a case, governmental supervision of each situation is justified.

The plaintiffs also contend that the ordinance providing for special uses is invalid because it does not specify standards by which the county board of supervisors is to judge whether a special use permit should be granted. Al-

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though the ordinance does not prescribe standards in so many words, it does state that special uses are established for the purpose of providing 'for the location of special classes of uses which are deemed desirable for the public welfare within a given district or districts, but which are potentially incompatible with typical uses herein permitted within them * * *.'' It also empowers the board of supervisors to impose ''such * * * conditions as it considers necessary to protect the public health, safety and welfare.'' A fair reading of the ordinance shows that it contemplates that the county board will weigh the desirability of the proposed use against its potential adverse impact. Since the board of supervisors is a legislative body, precise standards to govern its determination are not required.

The plaintiffs' next contention is that since the impact of a special use is like the impact of a variation, the statutory requirement that written findings of fact must accompany a variation should be applied to special uses. They also assert, again by analogy to variations, that if the zoning board of appeals rejects a special use, a three-fourths majority of the county board of supervisors should be required to grant the permit. In the present case no finding of facts was adopted by the county board. The special use permit was granted without a three-fourths vote of the county board, although the board of zoning appeals had rejected the club's application, and had found specifically that the proposed use would be incompatible with the general character of the neighborhood and its trend of development, would cause considerable depreciation of surrounding property, and would increase traffic congestion.

We recognize that because the special use may have the same impact upon nighboring property as a variation, pro-

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cedural safeguards similar to those prescribed for variations might be desirable for special uses as well. But the enabling act imposes these safeguards only as to variations, and the two techniques are not identical. The scope of the special use, and its purpose, differ from those of the variation, which is designed to handle cases of practical difficulty or particular hardship to property owners created by zoning restrictions. For this court to impose upon the local legislative body, in dealing with special uses, the procedures required for variations would be to move from interpretation of the act to policy determination and implementation. This is the function not of the court, but of the General Assembly.

Furthermore, the impact of a special use may resemble that of an amendment as well as a variation. Yet the statutory procedures for amendments vary greatly from those for variations. A three-fourths vote of the county board is required if 20% of the adjacent landowners object, but no findings of fact are required since an amendment is considered a legislative act. By analogy to the plaintiffs' contention in this case, it may be argued that amendment procedures rather than variation procedures should be required when granting a special use permit. Which, if either of the statutory procedures is appropriate for the new special use technique that has developed under the statute is a matter for legislative determination.

It is true that in *Rosenfeld* v. *Zoning Board of Appeals*, 19 Ill. App. 2d 447, the Appellate Court set aside a special use permit in part for lack of written findings of fact, although it recognized that findings were not required by the zoning ordinance or the enabling act. In that case, however, the special use was granted by the zoning board of

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appeals of Chicago and review was under the Illinois Administrative Review Act. (Ill. Rev. Stat. 1959, chap. 110, pars. 264-279.) Review under that act is on the record made in the administrative agency and its findings of fact are to be held *prima facie* true and correct. (Ill. Rev. Stat. 1959, chap. 110, par. 274.) Orderly and efficient review procedure under the act may, therefore, require that the administrative agency make written findings. The same reasoning does not apply in the present case where the special use permit was granted by a legislative body and judicial review is had in an independent action on a new record made in court.

The plaintiffs contend, finally, that to allow the club to conduct its proposed activities under a special use permit will deprive them of their property without due process of law. They argue that the damage to their property far outweighs any public benefit the club may produce. Although an expert witness for the plaintiff testified that operation of the club would substantially depreciate the value of surrounding property, two witnesses for the defendants took the opposite view. The county board imposed several restrictions designed to protect nearby houses from excessive light and noise. We think the record shows that the county board's action was not arbitrary and did not deprive the plaintiffs of their property without due process of law.

The judgment is affirmed.

*Judgment affirmed.*

Mr. Chief Justice House, dissenting:

The county has only the powers delegated to it, expressly or by necessary implication. There is no specific authority granted by the county zoning enabling act for

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special use procedure, nor, in my opinion, can the device be justified under the general power to "regulate," "restrict" and "prohibit." How can it be said that a legislative intent was manifested to permit special use procedure when, as the majority opinion recognizes, such procedure was unknown at the date of enactment of the enabling legislation? The fact that statutory restrictions and standards are set up for amendments and variations indicates a legislative intent to the exact contrary.

I agree with the majority that it is a matter for legislative determination whether amendment, variation or other procedure is appropriate for the new special use technique. But, that determination must come from the legislature together with suitable standards fixed for application of the procedure. It should not, as here, be left without restriction to the whim of the local governing body.

In one breath the majority opinion admits that unlimited application of the special use technique would take away the guarantee to property owners which is the very vitals of zoning and in the next approves special use procedure because its unlimited application "is not required." The ingenuity of members of our profession could conceivably conjure up so many "unique" situations which would require applications of special use procedures that *ad hoc* determination could become the rule rather than the exception.

The *Bell Telephone case* (402 Ill. 617) is readily distinguishable. First, the ordinances involved are entirely different and, second, the special use device was not in

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question, but the issue was whether area and height restrictions in the volume district were applicable.

From the standpoint of zoning enthusiasts and administrators the special use device provides a flexible methed disposing of troublesome "unique" situations. On the other hand, its use in such cases as here (recreation center) is the further limiting of the rights of ownership of property under the guise of the much tortured and misused police power.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1960

## No. 473

**ANTHONY C. KOTRICH and CLARA KOTRICH, his wife; JOHN EKERN OTT and CATHLEEN L. OTT, his wife; EVA BOITANO; PAUL FRENZEN and CLARA FRENZEN, his wife; WESLEY R. STARKEY and WILMA A. STARKEY, his wife; JOHN H. LOGAN and VERNA S. LOGAN, his wife; KEITH E. LUCAS and GLADYS LUCAS, his wife; WILLIAM T. MURPHY and FRANCES C. MURPHY, his wife; ROLAND E. GRELLO and DOROTHY A. GRELLO, his wife; ALBERT M. PELLETIER and JOSEPHINE B. PELLETIER, his wife,**

*Plaintiffs-Appellants,*

vs.

**COUNTY OF DU PAGE, ILLINOIS, a Municipal Corporation and SALT CREEK CLUB, a not for profit corporation in Illinois,**

*Defendants-Appellees*

On Appeal from the Supreme Court of Illinois

## MOTION FOR LEAVE TO FILE PETITION FOR REHEARING


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IN THE

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Now come the plaintiffs-appellants and respectfully move that the Petition for Rehearing heretofore received by the Clerk, on January 3, 1961, be filed instanter and/or out of time, for the reason and ground that;

Counsel herein has been informed by Erick H. Hart, president of Chicago Law Printing Corporation of Chicago, Illinois, who is the person directly charged with and and who supervised the printing and delivery of the said Petition, that at the hour of 6:00 P.M. on December 29, 1960, said Erick H. Hart, delivered a parcel containing forty (40) copies of the said Petition, along with his affidavit of service, to the clerk in charge of receiving such mail at the Central Post Office, in Chicago, Illinois; that the said parcel was properly addressed to the Clerk of this Court and had affixed thereto, sufficient United States Air Mail Postage; that said Erick H. Hart, was then told by the said postal clerk that said parcel would be placed aboard a plane and arrive in Washington, D. C. in ample time to be delivered the next morning, to wit: on December 30, 1960; that he has since inquired of the said clerk as to what occurred, and has been specifically informed by him, that said parcel did leave the City of Chicago aboard a plane bound for Washington, D. C. during the night of December 29, 1960, and that said delay in the delivery of the said parcel to the clerk, until January 3, 1961, occurred after the said parcel was placed aboard a plane bound for Washington, D. C. on the evening of December 29, 1960; and that the said parcel now in the hands of the Clerk of this Court, bears a postage cancellation mark of 8:00 P.M., December 29, 1960, affixed at Chicago, Illinois.

Respectfully submitted,

.....

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